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IN THE

Supreme Court of the United States

October Term, 1964

No. 412

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.,

Appellants,

v.

E. LESLIE HAMM, ET AL.,

Appellees.

STATEMENT OF JURISDICTION

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STATEMENT OF JURISDICTION

I.

OPINION OF THE COURT BELOW

The opinion of the three-judge District Court for the Eastern District of Virginia in the instant case is as yet unreported and will be found—as *E. Leslie Hamm, et al., v. Virginia State Board of Elections, et al.*, Civil Action No. 3127—in Appendix A of this statement.

II.

THE JURISDICTION OF THE COURT

1. This suit was instituted by appellees in the United States District Court for the Eastern District of Virginia, Alexandria Division, seeking a declaratory judgment and preliminary and permanent injunctions restraining the enforcement, operation and execution by appellants of Section 38 of the Constitution of Virginia and Sections

24-28, 24-118, 24-120, 58-790, 58-804, 58-880 and 20-101 of the Code of Virginia (1950) as amended. Jurisdiction was invoked under the Fourteenth and Fifteenth Amendments to the Constitution of the United States; 42 U.S.C. 1971(a), 1981, 1982 and 1983; 28 U.S.C. 1343(3) and 2201; and 28 U.S.C. 2281 and 2284. A three-judge District Court was convened pursuant to 28 U.S.C. 2281 and 2284.

This appeal is taken from the judgment of the three-judge District Court declaring the above-specified provisions of Virginia law (with the exception of Section 20-101 of the Virginia Code) to be unconstitutional and enjoining their enforcement.

The statute pursuant to which this appeal is brought is 28 U.S.C. 1253.

2. The date and time of the entry of the judgment sought to be reviewed by this appeal is April 28, 1964. The judgment in question will be found in Appendix B of this statement. The notice of appeal was filed in the United States District Court for the Eastern District of Virginia, at Alexandria, on June 24, 1964.

3. The United States Code, 28 U.S.C. 1253, confers jurisdiction of this appeal upon this Court. That statute provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice of hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (June 25, 1948, c. 646, 62 Stat. 926).

4. The following cases sustain the jurisdiction of this Court:

(a) *St. John* v. *Wisconsin Employment Relations Board*, 340 U. S. 411, 414 (1951).

(b) *Palmetto Fire Insurance Co.* v. *Conn*, 272 U. S. 295, 305 (1926).

(c) *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959).

(d) *Davis* v. *Mann*, ... U.S. ..... (decided June 15, 1964).

5. This appeal involves the validity of one provision of the Constitution of Virginia and six Virginia statutes. Because of their length, the provisions of the Virginia law in question are not set out verbatim here, but will be found in Appendix C of this statement. Specifically, the following portions of the Virginia laws under consideration were challenged and declared unconstitutional:

(a) Article II, § 38 of the Virginia Constitution—requiring lists of those who have paid their poll taxes to state "white and colored persons separately." Code of Virginia (1950) Volume 9, pp. 456-457.

(b) Section 24-28 Code of Virginia—requiring registration lists of "white and colored" voters to be kept and arranged in separate books or records. Code of Virginia (1950) Volume 5, p. 211.

(c) Section 24-118 Code of Virginia—requiring registration lists of voters in certain counties and cities to be kept in loose leaf binders "with white sheets for recording the names of white voters and buff sheets for recording the names of colored voters." Code of Virginia (1950) Volume 5, pp. 234-235.

(d) Section 24-120 Code of Virginia as amended in 1963, requiring lists of those who have paid their poll taxes and filed certificates of residence to state "white and colored persons" and certain tribal Indians

separately. Code of Virginia (1950) as amended, Volume 5, 1964 Cumulative Supplement, p. 66.

(e) Section 58-790, Code of Virginia, requiring assessors, at the time of making assessments of real estate to "note whether the owner is white or colored, or Indian as defined by Section 1-14 of the Code." Code of Virginia (1950) Volume 8, p. 644.

(f) Section 58-804, pars. b,c,d and h, Code of Virginia, requiring land books for the cities and counties to be arranged so that separate listings are made of real estate owned by "white persons," "colored persons" and certain "tribal Indians." Code of Virginia (1950) Volume 8, pp. 650-651.

(g) Section 58-880, Code of Virginia, requiring personal property books to be arranged so that personal property assessments with taxes and levies are shown separately for "white persons" and "colored persons." Code of Virginia (1950) Volume 8, p. 681.

III.

THE QUESTION PRESENTED

1. Did the Court below err in declaring Section 38 of the Constitution of Virginia and Sections 24-28, 24-118, 24-120, 58-790, 58-804(b), (c), (d) and (h) and 58-880 of the Virginia Code in conflict with the Fourteenth Amendment to the Constitution of the United States and enjoining their enforcement?

IV.

STATEMENT OF THE CASE

On November 6, 1963, appellees instituted suit in the United States District Court for the Eastern District of Virginia for a declaratory judgment and preliminary and permanent injunctions restraining the enforcement, oper-

ation and execution by appellants of specified provisions of the Constitution of Virginia and the Virginia Code.

Appellees Hamm, Barber, Johnson, Tancil and Williams are members of the Negro race, citizens of the United States and residents, property owners, taxpayers and qualified voters of the Commonwealth of Virginia. Appellees Brooks, Hussey and Young are members of the white race, citizens of the United States and residents, property owners, taxpayers and qualified voters of the Commonwealth of Virginia.

Appellants are the Virginia State Board of Elections; C. H. Morrissett, State Tax Commissioner; the Honorable William P. Woolls and the Honorable Franklin P. Backus, Judges of the Corporation Court of the City of Alexandria, Virginia; the Electoral Board, Treasurer, General Registrar, Director of Real Estate Assessments and Commissioner of the Revenue of Arlington County and the City of Alexandria, Virginia; and the Electoral Board, Director of Finance, General Registrar and Supervisor of Assessments of Fairfax County, Virginia.

Appellees alleged that in the enforcement, execution and administration of certain provisions of the Constitution of Virginia and the Virginia Code requiring the making and maintenance of racially separate designations and records, appellants were depriving appellees and others similarly situated of rights secured to them by the Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C.A. 1971(a), and that such provisions of Virginia law were violative of the above-specified provisions of Federal law. These allegations were denied by appellants.

Assailed as unconstitutional in the instant case were those provisions of Virginia law which direct the making

and maintenance of racially separate lists of persons who have paid their poll taxes (Sec. 38, Constitution of Virginia; Section 24-120, Code of Virginia, 1950, as amended); racially separate voter registration lists (Sections 24-28 and 24-118, Code of Virginia, 1950, as amended) and racially separate real and personal property ownership and assessment books (Sections 58-790, 58-804 and 58-880, Code of Virginia, 1950, as amended).

Appellees introduced no evidence tending to show any discriminatory utilization of the poll tax lists, voter registration lists or property ownership and assessment books maintained as required by the statute, and the court below specifically found that "no voting rights and tax assessments are impaired by the present practice" required by the provisions of Virginia law under attack. The court below specified that the infirmity of the challenged enactments lay "in their mandate of *separation* of names by race," declared such enactments unconstitutional and enjoined their enforcement. From the judgment of the court below entered in conformity with its opinion, the instant appeal is taken.

V.

THE QUESTION PRESENTED IS SUBSTANTIAL

For a number of reasons, the question decided by the court below is of such a substantial nature as to require plenary consideration by this Court, with briefs on the merits and oral argument. In this connection, the precise question presented in the case at bar—*i.e.*, whether or not State laws directing the maintenance by public officials of racially separate records, for statistical and identification purposes only, are *per se* violative of the Fourteenth Amendment, when there is no showing of any discriminatory

utilization of such records by any public officer or private individual—has never been passed upon by this Court. So far as counsel for appellants have been able to ascertain, a situation analogous to that presented in the instant case has been considered in only one decision, *Stokes* v. *County Clerk of Los Angeles County*, 122 Cal. App. (2d) 229, 264 P. (2d) 959. In that case, petitioners sought a writ of mandamus compelling the County Clerk of Los Angeles County to issue them a marriage license and a certificate of registry of marriage required by California law as a condition precedent to the solemnization of the marriage ceremony. Petitioners had declined to state their race or color in the spaces provided therefor in the relevant application form, asserting that such disclosure would deprive them of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. As a result, the respondent clerk refused to issue the required license and accompanying certificate of registry. Rejecting petitioners' contention and affirming an order denying the requested writ of mandamus, the District Court of Appeals declared (264 P. (2d) at 961, 962-963):

> "The statute under consideration places no limitation on the right to marry. It merely requires persons applying for a marriage license *to disclose certain information for statistical and identification purposes. The requirement applies equally to all persons of every race or color and makes no attempt to discriminate between races.*
>
> "And, as pointed out by respondent county clerk, the certificate of registry is part of the state-wide programme of Vital Statistics under the supervision of the State Department of Public Health which is charged with the uniform and thorough enforcement of Division 9 of the Health and Safety Code, which

covers Birth, Sections 10150-10330, Death, Sections 10350-10501, and Marriage Registration, Sections 10526-10536.

* * *

"As stated in People v. Western Fruit Growers, 22 Cal. 2d 494, 499, 140 P. 2d 13, 16, 'The principle is universally recognized that all presumptions and intendments are in favor of the constitutionality of a statute and all doubts should be resolved in favor of its validity. Ray v. Parker, 15 Cal. 2d 275, 280, 101 P.2d 665; Jersey Maid Milk Products Co. v. Brock, 13 Cal. 2d 620, 636, 91 P. 2d 577.'

* * *

"And as urged by respondents Registrar and State Department of Health, '*information as to the item of color or race are both valuable and necessary for the State to amass information as to population*, birth and death rates and trends, and the relationship of color or race to factors of mortality, morbidity, fecundity, public health *and matters or problems of social interest*. For example, it has been contended that certain races are more susceptible to certain disease which in turn requires special health precautions. Certainly, it is a legitimate function of State government to amass statistics designed to verify or disprove a relationship between an individual's race or color and such individual's susceptibility to disease.'

"In the light of the foregoing *the conclusion is irresistible*, '*that the information required* by section 10526(b), Health and Safety Code, *is a valid exercise of police power and does not constitute an invasion of constitutional rights.*

"Appellants urge that the demanded information is without reasonable relation to any purpose within the competency of the State.

"This point is without merit. *This court has reached the conclusion that the disputed provisions of the statute constitute a valid exercise of the police power*

and that it is reasonably necessary for the public welfare to accumulate information as to race and color for legitimate identification and statistical purposes." (Italics supplied).

Similarly, in the case at bar, the challenged provisions of Virginia law merely require the ascertaining and cataloguing of information for statistical and identification purposes to enable the State to amass information concerning its citizens which is reasonably necessary to the public welfare. The organic law and statutes in question apply equally to all citizens and make no effort to discriminate between races. Indeed, extensive support may be marshaled for the view that the accumulation of such information is not merely reasonably necessary but *absolutely essential* to the proper functioning of government in numerous related areas.

One of the most forceful statements in this connection is that of G. Franklin Edwards, Ph.D., Professor of Sociology at Howard University, Washington, D. C. Speaking in the American Journal of Public Health, Vol. 52, No. 4, pp. 671, 674, Dr. Edwards declared:

> "In this connection *it can be stated categorically that reliable statistics by race in those areas where discrimination and civil rights violations are alleged afford the minority group the best protection it can hope to have. It would appear that instead of working for the elimination of race from public records, many minority group leaders would insist that the item be included and data based upon it be made available for public use.*
>
> "The Civil Rights Commission in its 1959 report invited attention to the difficulties it experienced in assessing the pace of school desegregation in those areas where race has been removed from the school records. Accordingly, the commission recommended

that the United States Office of Education in cooperation with the Bureau of the Census conduct an annual school census that will show the number and race of all students enrolled in all public educational institutions in the United States, and compile such data by states, by school districts, and by individual institutions of higher education within each state.' The recommendation was reaffirmed in its 1961 report, though the commission disapproved of keeping the race item on the school records of individuals.

"Though the above example is not taken from the area of vital statistics records, *it illustrates the point that an effective campaign, designed to protect group rights, cannot be waged in any area where discrimination is alleged unless one has in hand a body of reliable evidence.*" (Italics supplied).

Moreover, at its April, 1963 meeting, the Population Association of America adopted the following resolution with respect to racial designations and classifications printed in The Registrar and Statistician, May 1963, p. 27:

"Race-color classifications are among several items on vital and health records that yield important statistical data for public health and *social programs, for scientific research, and for public policy determination and administration.*

"Without in any way approving of social distinctions based on race or accepting any particular notion or definition of 'race,' we must as scientists take cognizance of the fact that groups are set apart in this way and that they have differing economic, social, and demographic backgrounds of great significance for them and for their future development. *Without basic information concerning these groups, scientists and administrators are gravely handicapped in gaining an understanding of the changing group structure of our society, and responsible leaders are left to base inter-*

group policy on rumor and ignorance rather than knowledge. For example, full information on the Negro's health and his relative standing in the economic, social, and political structure of our nation permits evaluation of his position with respect to government, labor, industry, and the general public. Such social statistics are essential for the efficient use of our resources for all of our population." (Italics supplied).

In addition, Dr. Philip M. Hauser, President of The American Statistical Association, strenuously advocated the maintenance of records disclosing information upon the race, religion and national orgin of citizens in their various activities. In The American Statistician, Vol. XVI, No. 2, April 1962, Dr. Hauser observed:

"Proponents of the collection of information on race, religion and national origin base their position on three major grounds: 1) the need for the information for use in social science—that is for improving our understanding of society; 2) the need for such information for use in 'social engineering' that is as a basis for effectively and efficiently dealing with a wide range of problems ranging from marketing to public policy; 3) the conviction that prejudice and discriminatory practices flew from ingorance rather than knowledge.

* * *

"The use of information about race, religion and national origin by the social engineer is its use in the identification and resolution of problems in the social, economic and political order. To the extent that these characteristics produce variation in the thought and behavior of the person or the group, they indicate difference in types of problems which are generated and, therefore, differences in treatments which are indicated. *The policy maker and the administrator can act more effectively and efficiently with full information about the group that is to be served than they can in*

ignorance. Full information about the characteristics of the population to be served, including race, religion and national origin, provides a sounder basis than does ignorance for the key functions of management—planning program, administering program, and evaluating the impact of the program.

* * * *

"It would seem that we cannot, as a group of scientists and administrators accept the proposition that knowledge, any kind of knowledge, is a dangerous thing. Information itself is always neutral. It may be used for 'harmful' purposes but it may also be used for 'beneficient' purposes. Moreover, the absence of information may prevent beneficient action and encourage and perpetuate harmful action. *It seems to me that it is an act of professional integrity and consistency for the statistician to oppose any effort to suppress any form of knowledge about man or the social order. It may be argued that it is also an act of good citizenship."* (Italics supplied).

In light of the foregoing statements, it is difficult to conceive how it may even be intimated that the making and maintenance of the racial designations and records under attack in the instant case infringe any right of the appellees. With respect to the maintenance of racially separate poll tax and voter registration lists, the above-quoted observations of Dr. Edwards of Howard University are particularly pertinent. This is especially true in light of the significant circumstance that the United States Commission on Civil Rights has collected, analyzed, catalogued and published information obtained for it by local Virginia registrars and the Virginia State Board of Elections, the principal defendant in the case at bar, from the very lists under consideration. See, 1961 United States Commission

on Civil Rights Report, Number 1: Voting, pp. 302-307. Moreover, in the body of its report, the Commission devoted an entire chapter to "Statistics of Nonvoting" and considered various circumstances under which racial discrimination in voter participation may exist. In this connection, the Commission pointed out (Report, *supra*, at 101-102):

> "In such cases *statistics* on numbers of registered voters *by race* provide a useful starting point for inquiry into the existence of discrimination. Indeed the Commission's survey of 21 Black Belt counties, discussed in Part III below, was undertaken on the basis of voter registration statistics. Moreover at least one court has indicated that where a majority of the population in a county is Negro, the fact that not one Negro is registered must lead to an inference of discrimination. Finally the kind of comparative analysis which such statistics permit may yield clues as to factors other than discrimination which tend to impede or diminish the exercise of the franchise.
>
> "For all these reasons, *it is desirable that accurate statistics* on registration and voting *by race* be maintained; and for these reasons, the Commission has again attempted, as it did in its *1959 Report*, to collect and publish the most complete and reliable registration statistics possible.
>
> * * *
>
> "The Commission sought racial registration figures for the 18 States whose laws in 1954 permitted or required racially segregated public school systems: Alabama, Arkansas, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.
>
> * * *
>
> "In three States—Louisiana (where there is sub-

stantial discrimination), Florida (where there is some), and Virginia (*where there appears to be none*) —official statistics are compiled on the State level by county and by race. (*Virginia's figures are estimates sent in by the local officials to the State Board of Elections*)." (Italics supplied).

Similarly, as recently as April 6, 1964, this very Court had occasion to make use of statistics which were readily available because of the maintenance of racially separate tax records. See, *Arnold v. North Carolina* ..... U. S. ....., 12 L. Ed. (2d) 77. In that case, this Court reversed a judgment convicting petitioners of murder because the testimony adduced therein made out a *prima facie* case of denial of the equal protection guaranteed by the Fourteenth Amendment in the alleged systematic exclusion of Negroes from the grand jury which indicted petitioners. A portion of the evidence to which this Court referred is described in the following statement (12 L. Ed. (2d) at 78):

"In support of their motion to quash the indictment because of consistent exclusion of Negroes from grand jury service, petitioners, both Negroes, offered testimony of the county tax supervisor showing that the tax records of the county, *on which Negro and white persons are listed separately and from which the names of jurors are derived, revealed* 12,250 white persons and 4,819 Negroes in the county, with 5,583 white men and 2,499 Negro men listed for poll tax. In addition, the clerk of the trial court testified that while there have been as many as four or five Negroes upon the regular jury panel from which grand jurors have been chosen, in his 24 years as clerk he could remember only one Negro serving on a grand jury, another having been selected but excused." (Italics supplied).

In view of the utilization by the United States Commission on Civil Rights of the records required to be kept by the enactments challenged in the case at bar and the utilization of similar records by this Court in the *Arnold* case, it is surely inappropriate for appellees to assert that the maintenance of such records does not serve as a legitimate means of obtaining valid statistical information concerning the number of white and colored persons who are qualified to vote, or that the extent of participation by Negroes in elections is not a vital item of information in determining "the Negro's . . . relative standing in the . . . . political structure" of the nation. See, The Registrar and Statistician, *supra*, p. 27. With respect to identification, appellees admitted in the court below that in registering its citizens for the purpose of motor vehicle operation, a State may use racial designations which provide valuable information in identifying persons to whom operator's permits have been issued and that this practice has some reasonable relation to the achievement of a legitimate governmental objective. Appellants submit that the same is true of a State's registering its citizens for the purpose of voting, as such designations furnish fully as valuable information concerning the identity of persons registered to vote. Equally applicable are the use of racial designations and lists concerning ownership and assessment of real and personal property. Manifestly, the incidence of real and personal property ownership, and the valuation of such property, is highly relevant in determining "the Negro's . . . relative standing in the economic, social . . . structure" of the nation. See, The Registrar and Statistician, *supra*, p. 27.

In its exceedingly brief opinion, the court below cited only four cases, all decisions of this Court. Two of these—

Brown v. *Board of Education*, 347 U. S. 483, and *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715—are so obviously foreign to the issue presented in the case at bar as to make discussion of them unnecessary. Moreover, this Court's recent opinion in *Anderson* v. *Martin*, 375 U. S. 399, 11 L. Ed. (2d) 430, states nothing to the contrary. In that case, the question presented was whether or not a State statute requiring the racial designation of candidates for elective office on nomination papers and ballots constituted a violation of the Fourteenth Amendment or Fifteenth Amendment to the Constitution of the United States. Invalidating the statutes there under consideration, this Court emphasized (11 L. Ed. (2d) at 432, 433, 434):

> "At the outset it is well that we point out what this case does not involve. It has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State *to require or encourage* its voters to discriminate *upon the grounds of race* In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.
>
> * * *
>
> "The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification *that induces racial prejudice at the polls.*
>
> * * * *
>
> "Nor can the attacked provision be deemed to be

reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates.

* * *

"Race is the factor upon which the statute operates and its involvement *promotes the ultimate discrimination* which is sufficient to make it invalid." (Italics supplied).

In manifest contrast to the situation discussed in the *Anderson* case, it is clear that the maintenance of racially separate lists of the character under consideration in the case at bar does not "require or encourage" anyone "to discriminate upon the grounds of race" or place "the power of the State behind a racial classification that induces racial prejudice" or promote an "ultimate discrimination" or, indeed, a discrimination of any sort. Significant in this connection is a comparison between the record in the instant case and that reviewed by this Court in *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 2 L. Ed. (2d) 488. The question presented in that case was whether or not a State, consistently with the Fourteenth Amendment, could compel an organization to reveal to the State's Attorney General the names and addresses of all its members and agents in the State without regard to their positions or functions in the organization. In its opinion invalidating application of the statute to the petitioners in that case, this Court emphasized (2 L. Ed. (2d) at 1493, 1498, 1500):

"Petitioner's claim is that the order, *in the circumstances shown by this record*, violated rights assured to petitioner and its members under the Constitution.

* * *

"We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause

of the Fourteenth Amendment. Petitioner argues that *in view of the facts and circumstances shown in the record*, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs.

* * *

"We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. *Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances,* we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." (Italics supplied).

The language of the Court's opinion italicized above serves to bring into bold relief the patent inadequacy of the present record to present a similar situation in the case at bar. In the court below, appellants introduced no evidence, but relied solely upon the contention that the maintenance of the racially separate records directed by the challenged enactments constituted, *per se*, a violation of the Fourteenth Amendment. The record is thus utterly devoid of any evidence tending to show any discriminatory utilization

by anyone of the records in question or that the maintenance of such records encouraged anyone to discriminate upon the basis of race or placed the power of the State behind a classification which induced racial prejudice by anyone in any aspect of public or private activity. Supportive of this observation is the express finding of the court below that "no voting rights and tax assessments are impaired by the present practice" mandated by the statutes under attack.

Finally, the decision of the court below is in several respects inexplicable. In this connection, the court declared that no State can "directly dictate or casually promote a distinction in the treatment of persons" solely on the basis of their color, and that the result of a statute or policy "must not tend to separate individuals" by reason of differences in their race. These observations totally ignore the fact that neither "persons" nor "individuals" are treated differently or separated by the statutes here involved. Only the *names* of and *data* relating to persons or individuals is separated, and this separation is effected solely for identification and statistical purposes.

Moreover, during the course of its opinion, the court below declared:

> "Of course, the designation of race, just as sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se. *For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege.* If the purpose is legitimate, the reason justifiable, then no infringement results. The infirmity of the provisions just mentioned lies in their mandate of *separation* of *names* by race." (Italics partially supplied).

Clearly, the court below has said in one breath that the securing and chronicling by the State of racial data for identification or statistical use is *not* unconstitutional, but that the separation of such data on a racial basis (the only basis, of course, upon which it can be separated) *is* unconstitutional. From the authorities previously set forth in this statement, it is undeniable that the information contained in the records here under consideration serves a vital and important statistical and informative purpose; thus its accumulation by the State meets the trial court's requirement of a legitimate purpose and justifiable reason. Yet, the court below forbade the synthesizing and formalization of such data in a useful manner. In effect, the court below has said that the Fourteenth Amendment views without disapproval the accumulation by a State of the data contained in the records here involved, but interdicts the compilation or arrangement of such information in the only form in which it can be made available for the accomplishment of the statistical and identification purposes of its accumulation.

CONCLUSION

Surely, it is wholly unreasonable to declare that a State may accumulate racial data on a racial basis but may not catalogue such data on a racial basis. Invalidation of those provisions of Virginia law challenged in the case at bar not only requires a fundamental rearrangement of books and records in every political subdivision of the State, it also announces an end of the ready availability of racial data which authorities agree is of vital importance in many aspects of social, economic, political and governmental activities. This result is dictated by the decision of the court below, despite that court's simultaneous declaration that the

accumulation of such data is permissible and that no impairment of voting rights or tax assessments exists. Manifestly, this result is utterly irreconcilable with the court's underlying observations and presents a substantial federal question which this Court has not previously considered. For these reasons, counsel for appellants submit that the question presented by this appeal should be accorded plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

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PROOF OF SERVICE

I, R. D. McIlwaine, III, one of the attorneys for the appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of August, 1964, I served copies of the foregoing Statement of Jurisdiction on the several appellees hereto by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows: Allison W. Brown, Jr., Esq., Suite 705, 1001 Connecticut Avenue, N. W., Washington 6, D. C., and Otto L. Tucker, Esq., 901 Princess Street, Alexandria, Virginia.

R. D. McILWAINE, III
Assistant Attorney General

APPENDIX A

OPINION OF THE COURT

(Argued February 21, 1964 Decided April 28, 1964)

Before Bryan, Circuit Judge, and Lewis and Butzner, District Judges

Allison W. Brown, Jr., Esquire, Washington, D. C. and Otto L. Tucker, Esquire, Alexandria, Virginia, attorneys for the plaintiffs;

Robert Y. Button, Esquire, Attorney General of Virginia; R. D. McIlwaine, III, Esquire, Assistant Attorney General of Virginia; William J. Hassan, Esquire, Commonwealth's Attorney, Arlington, Virginia; Ralph G. Louk, Esquire, Commonwealth's Attorney, Fairfax, Virginia; Earl F. Wagner, Esquire, Commonwealth's Attorney, Alexandria, Virginia, attorneys for defendants.

Albert V. Bryan, Circuit Judge:

Certain Virginia statutes and a section of her constitution are here attacked by plaintiff Negro and white citizens of the State as violative of the Fourteenth and Fifteenth amendments of the Federal constitution. The laws assailed deal with record relating to: (1) voting, (2) property tax assessments, and (3) divorce. Plaintiffs allege that provisions in the first category "require lists of persons who are qualified voters in Virginia to be maintained on a racially segregated basis."[1] The second category is averred

[1] Specifically, the following portions of Virginia's voting records laws are questioned as unconstitutional:

(a) Article II, § 38 of the Virginia Constitution—requiring lists of those who have paid their poll taxes to state "white and colored" persons separately."

(b) Section 24-28 Code of Virginia—requiring registration lists of "white and colored" voters to be "kept and arranged in separate books or records."

(c) Section 24-118 Code of Virginia—requiring registration lists of voters in certain counties and cities to be kept in loose leaf

to "provide for the maintenance on a racially segregated basis of public records pertaining to property ownership and taxation".[2] The divorce statute in suit directs that every decree of divorce must recite the race of the spouses.[3] Besides asking for a declaration of the invalidity of these statutory and constitutional provisions, plaintiffs also "seek an injunction restraining the various governmental officials named as defendants from enforcing, executing or administering their provisions."

The "separate but equal" racial doctrine was condemned a decade ago in Brown v. Board of Education, 347 U.S. 483 (1954). Subsequent decisional law has made it axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color. To be within the condemnation, the govern-

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[2] That part of the property ownership and taxation statutes criticized are:

(a) Section 58-790, Code of Virginia, requiring assessors, at the time of making assessments of real estate to "note whether the owner is white or colored, or Indian as defined by Section 1-14 of the Code."

(b) Section 58-804, pars. b, c, d and h, Code of Virginia, requiring land books for the cities and counties to be arranged so that separate listings are made of real estate owned by "white persons," "colored persons" and certain "tribal Indians."

(c) Section 58-880, Code of Virginia, requiring personal property books to be arranged so that personal property assessments with taxes and levies are shown separately for "white persons" and "colored persons."

[3] Section 20-101, Code of Virginia, requires "any interlocutory or final decree granting a divorce a mensa et thoro or a vinculo matrimonii . . . [to] contain a recital showing the race of the husband and wife. . . ."

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binders "with white sheets for recording the names of white voters and buff sheets for recording the names of colored voters."

(d) Section 24-120 Code of Virginia as amended in 1963, requiring lists of those who have paid their poll taxes and filed certificates of residence to state "white and colored persons" and certain tribal Indians separately.

mental action need not effectuate segregation or facilities directly. *Cf.* Anderson v. Martin, 375 U.S. 399, 402 (1964). The result of the statute or policy must not tend to separate individuals by reason of difference in race or color. No form of State discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth amendment freedoms. See, *e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-26 (1961); NAACP v. Alabama, 357 U.S. 449, 463 (1958).

Although the legislative history of the provisions presently under examination cannot adequately be traced, it is evident from the language employed that, save for the divorce decree statute, they serve no other purpose than to classify and distinguish official records on the basis of race or color. Separation of white and colored on the poll tax, residence-certificate and registration lists as well as on the assessment rolls renders these provisions invalid under the equal protection clause of the Fourteenth amendment.

Of course, the designation of race, just as sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se. For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege. If the purpose is legitimate, the reason justifiable, then no infringement results. The infirmity of the provisions just mentioned lies in their mandate of *separation* of names by race.

Vital statistics, obviously, are aided by denotation in the divorce decrees of the race of the parties. This provision of section 20-101 of the Virginia Code is not objectionable in law. Of course the advertence must be made in ev[illegible] case, not just in suits involving Negroes.

For the reasons outlined, the defendant State and local officers will be restrained from further administration and enforcement of the Virginia laws in issue insofar as they are inconsistent with the views herein expressed. Since no voting rights and tax assessments are impaired by the present practice, and so there is no urgency for earlier changes, compliance with the restraint we now impose will not be required before December 31, 1964.

APPENDIX B

FINAL ORDER

Upon the findings of fact and conclusions of law, as well as for the reasons, set forth in the opinion of the Court this day filed, it is DECLARED:

1. That Article II, § 38 of the Constitution of Virginia is in conflict with the Fourteenth amendment of the Constitution of the United States insofar as the said section requires the lists of poll taxes paid to state the names of white and colored persons separately;

2. That § 24-28 of the Code of Virginia is in conflict with the Fourteenth amendment of the Constitution of the United States insofar as the said section requires that the voting registration lists of white and colored persons be kept and arranged in separate books or records;

3. That § 24-118 Code of Virginia is in conflict with the Fourteenth amendment of the Constitution of the United States insofar as the said section requires the registration lists of voters in named counties and cities to be kept in binders with white sheets for recording the names of white voters and buff sheets for recording the names of colored voters;

4. That § 24-120 Code of Virginia, as amended in 1963,

is in conflict with the Fourteenth amendment of the Constitution of the United States insofar as the said section requires the lists of persons who have paid their poll taxes and filed certificates of residence to state separately the names of white and colored persons and certain tribal Indians;

5. That §§ 58-790; 58-804, paragraphs b, c, d and h; and 58-880 Code of Virginia are in conflict with the Fourteenth amendment of the Constitution of the United States insofar as the said sections require the lists of assessments of real estate, the arrangement of the listings in the land books of real estate, and the arrangement of the personal property books to note and show separately the names of the property owners as white or colored persons; and

6. That § 20-101, Code of Virginia (1950) is not in conflict with the Fourteenth amendment of the Constitution of the United States.

Accordingly, it is ADJUDGED, ORDERED and DECREED that the defendants, their agents, employees and successors be, and each of them is hereby, restrained and enjoined from enforcing any of the constitutional or statutory provisions hereinbefore declared to be in conflict with the Fourteenth amendment of the Constitution of the United States, but this injunction shall not be effective before December 31, 1964.

.....
United States Circuit Judge

.....
United States District Judge

.....
United States District Judge

April 28th, 1964.

APPENDIX C

CONSTITUTION OF VIRGINIA

§ 38.—The treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city who have paid not later than six months prior to such election, the State poll taxes required by this Constitution during the three years next preceding that in which such election is held; which list shall be arranged alphabetically, by magisterial districts in the counties, and in such manner as the General Assembly may direct in the cities, shall state the white and colored persons separately, and shall be certified by the oath of the treasurer. The clerk, within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county or city, to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy, without delay, at each of the voting places, and, within ten days from the receipt thereof, to make return on oath to the clerk, as to the places where and dates at which said copies were respectively posted, which return the clerk shall record in a book kept in his office for the purpose; and he shall keep in his office, for public inspection, for at least sixty days after receiving the list, not less than ten certified copies thereof, and also cause the list to be published in such other manner as may be prescribed by law. The original list returned by the treasurer shall be filed and preserved by the clerk among the public records of his office for at least five years after receiving the same.

Within thirty days after the list has been so posted, any

person who shall have paid his capitation tax, but whose name is omitted from the certified list, may, after five days' written notice to the treasurer, apply to the circuit court of his county, or corporation court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide.

The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the officer designated by law, who shall charge the amount of the poll taxes stated therein to such treasurer, unless previously accounted for.

Further evidence of the prepayment of the capitation taxes required by this Constitution, as a prerequisite to the right to register and vote, may be prescribed by law.

CODE OF VIRGINIA (1950)

§ 24-28.—The State Board of Elections shall prepare suitable books or other appropriate forms or records for the registration of voters, and forward them to the clerks of the circuit courts of the counties and the corporation courts of the cities, to be by them distributed to the registrars of their respective election districts. The records shall be so arranged as to admit of the alphabetical classification of those registered, and shall be ruled in parallel columns in which shall be entered the full name of the voter, the fact that he is sworn, his age, occupation, his place of

residence at time of registration, the length of time of his residence in the county or city, and, if in a city, the name of the street and number of house in which he resides if numbered, the length of time he has resided in the State, and if naturalized, the date of his papers, and if known the court by which they were issued. The list of voters, white and colored, men and women, shall be kept and arranged in separate books or records, and shall indicate by appropriate designation the voters who are on the permanent rolls.

§ 24-118.—In the discretion of the electoral board of any city or any county, in lieu of registering voters in permanent books the electoral board may provide for the registration of voters (1) on serially numbered cards, or (2) in loose leaf binders locked with an approved key locking device with white sheets for recording the names of white voters and buff sheets for recording the names of colored voters, provided that such system of registration shall not be adopted by the electoral board of any county unless and until the same be approved by the governing ~~body~~ of the county.

In the event that such card or loose leaf binder system of registration is adopted by the electoral board of any city, or by the electoral board of any county, it shall be the duty of the general registrar of such city, or the general registrar or registrars of the several voting districts of such county, as the case may be, including any town voting districts or precincts in such county, to proceed forthwith to register the names of all voters of such city, or of the several voting districts of such county and of any town therein, as the case may be, including those heretofore registered, on serially numbered cards, or in loose leaf

binders, approved by the electoral board, which registration shall be as effective as if the names of such persons had been registered in permanent books, as heretofore provided by law. Thereafter, all laws applicable to registration books and the use thereof shall apply to such registration cards, or loose leaf binders. This section shall not be construed as authorizing the general registrar of any city, or any registrar of any election district of any county or of any town therein, or the electoral board thereof, to provide for the destruction of any books, or records, now in existence, relating to registration of voters.

§ 24-120.—The treasurer of each county and city shall, at least five months before the second Tuesday in June in each year in which a regular June election is to be held in such county or city, and at least one hundred and fifty-eight days before each regular election in November, file with the clerk of the circuit court of his county or the corporation court of his city (1) a list of all persons in his county or city who have filed certificates of residence under § 24-17.2, and (2) a separate list of all persons in his county or city who have paid not later than six months prior to each of such dates the State poll taxes required by the Constitution of this State during three years next preceding that in which such election is to be held, which lists shall state the white and colored persons separately, if known, and shall be verified by the oath of the treasurer. The treasurer shall, in each such list, designate as a tribal Indian any person who requests to be so designated and who shall have furnished the treasurer with an affidavit, made by the Chief of any Indian tribe existing in this State, that such person is a member of such tribe and to the best knowledge and belief of the Chief is a tribal Indian as defined in § 1-14 of the Code of Virginia.

§ 58-790.—The person or persons, or officer or officers, designated under the provisions of this article shall, as soon as practicable after the first day of January in the year for which they are appointed to serve, proceed to examine all lands and lots assessable by him, or them, with the improvements and buildings thereon, within his or their city or county, and shall, upon examination, ascertain and assess the fair market value thereof, and at the same time shall note whether the owner is white or colored, or Indian as defined by § 1-14 of the Code.

§ 58-804.—(b) The land books shall be so arranged that real estate owned by white persons shall be assessed in one part of the book and real estate owned by colored persons shall be assessed in another part of the book and real estate owned by tribal Indians in fee simple who have requested to be so designated and who have furnished the commissioner of the revenue with affidavits, made by the chief of any Indian tribe existing in this State, that such Indian is a member of such tribe and to the best knowledge and belief of the chief is a tribal Indian as defined in §1-14 of the Code, shall be assessed in another part of the book.

(c) Tracts of lands in counties shall be entered by magisterial or school districts and town lots shall be entered upon sheets provided in the land book for that purpose.

(d) The land book on which levies are to be assessed on city lots shall be prepared so that lots owned by white persons and lots owned by colored persons and lots owned by tribal Indians who have complied with paragraph (b) hereof will be assessed separately.

(h) Nothing in this Section shall be construed to prohibit any commissioner of the revenue of any city from using a

land book in the form prescribed and furnished by or under the authority of the council of his city and at the cost of his city, provided such form contains the requirements that lots owned by white persons, and lots owned by colored persons and lots owned by tribal Indians who have complied with paragraph (b) hereof shall be assessed separately.

§ 58-880.—The personal property book shall be so arranged that personal property owned by white persons shall be assessed with taxes and levies in one part of the book and personal property owned by colored persons shall be assessed with taxes and levies in another part of the book.

§ 20-101.—Any interlocutory or final decree granting a divorce a mensa et thoro or a vinculo matrimonii, as the case may be, shall contain a recital showing the race of the husband and wife; but the failure of such decree to contain such recital shall not affect the validity of such decree or divorce.